SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 27 1965
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 622

PACIFIC COAST EUROPEAN CONFERENCE, PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, and their Respective Member Lines,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners Pacific Coast European Conference, Pacific Coast River Plate Brazil Conference, and their respective Member Lines, respectfully pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 3, 1965.

OPINIONS BELOW

The Report of the respondent Federal Maritime Commission, from which this case initially arose [R. XII-1118], is reported (without accompanying orders) in the Pike & Fischer loose-leaf service entitled "Shipping Regulation Reports", at 3 S.R.R. 677.[1] The opinion of the Court of Appeals [R. I-168], not yet officially reported, is reprinted in Appendix B hereto.[2]

JURISDICTION

The identical judgments of the Court of Appeals were entered February 3, 1965 [R. I-182, I-183; App.B, pp. 15, 16]. Timely petitions for review, filed March 4, 1965, were denied in a subsequent order filed April 30, 1965 [R. I-184-186]. An extension of time to file this petition was granted on July 17, 1965, extending the permissible time for filing until September 27, 1965 [App.C]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 5 U.S.C. §1040.

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[1]The opinion of the concurring and dissenting Commissioner John S. Patterson [R. XII-1164] commences at 3 S.R.R. 715.

Because of their excessive bulk, the various opinions at the Commission level—initial and final decisions, plus orders on remand—are all reprinted in a separate, Supplemental Appendix.

[2]References to the twelve-volume Record are to Volume and Page as designated in this Court, thus: "R. XII-1118," "R. I-168".

QUESTIONS PRESENTED

Important questions in the interpretation of the United States Shipping Act, 1916, as amended in 1961,[3] are presented here that have not heretofore been decided by this Court. Most of these questions involve, as well, critical, and novel, interpretations of the Administrative Procedure Act, and as such present issues of far-reaching significance to the entire field of federal administrative law. The questions are:

1. Under a federal statute that requires each contract of a class to be filed with an administrative agency, and which directs the agency, "after notice, and hearing, by order, [to] permit the use" of each such contract unless the agency finds that the contract does not comply with requirements of the statute, may the agency, without findings, publish a novel form of contract inconsistent with the statute and order it used "to the exclusion of any other contract"?

2. Where an administrative agency is authorized by statute to act only "after notice and hearing" and only "by order", may the agency act by general rule instead? Does the imposition of "an unusually heavy burden upon the Commission"[4] support its resort to general rule-making, not authorized by statute, in lieu of the adjudication that is expressly required by statute?

3. Where an administrative agency has held a hearing, after notice, "with issues limited to such matters as were there presented," may the agency thereafter,

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[3] 46 U.S.C.A. 813a, 75 Stat. 762.

[4] Opinion of the Court below [R. I-177; App.B, p. 10].

without notice, "abandon" the adjudicatory proceeding and "promulgate rules [to] establish the substance of approved contracts"?[5]

4. Where a federal statute requires "notice and hearing", may an administrative agency "look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise"?[6]

5. Is the statutory function of the Federal Maritime Commission under Section 14b of the Shipping Act, 1916, as amended (46 U.S.C. §813a), governed by Section 5 of the Administrative Procedure Act, as adjudication, or Section 4, as rule making? If the latter, may the agency validly make such rules without "any notice whatsoever",[7] or must the proceedings nevertheless be governed by Sections 7 and 8 of the Administrative Procedure Act?

6. Where a federal statute prescribes the substance of private contracts in specific detail, may an administrative agency modify the statutory terms under a delegation of authority to prescribe additional contract provisions "not inconsistent" with the statutory provisions?

7. Is the constitutional protection against deprivation of private property without due process of law violated by an agency order changing the terms and substance of private contracts, without statutory, or any, findings?

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[5] *Ibid.* [R. I-180, 181; App.B, pp. 13, 14].
[6] *Ibid.* [R. I-179; App.B, p. 12].
[7] *Ibid.* [R. I-180; App.B, p. 13].

STATUTES INVOLVED

The statutory provisions involved are Sections 14b and 22 of the Shipping Act, 1916, 75 Stat. 762 and 39 Stat. 736, 46 U.S.C. §§813a and 821; Section 3 of Public Law 87-346, 75 Stat. 764; and Sections 2, 4, 5, 7, and 8 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§ 1001, 1003, 1004, 1006 and 1007. All are printed in Appendix A hereto.

STATEMENT OF THE CASE

These cases came to the Court of Appeals to review two orders of the respondent Federal Maritime Commission. Jurisdiction in the Court below was provided by Section 1034 of Title 5, United States Code.

The cases have their roots in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), and the subsequent enactment in 1961 of amendments to the United States Shipping Act, 1916, designed to reverse *Isbrandtsen*. (Public Law 87-346, 75 Stat. 762). Section 14b, added to the Shipping Act by Public Law 87-346, is the governing statute here (46 U.S.C. §813a).

Petitioners are two associations, commonly called "conferences", of "common carriers by water in the foreign commerce", as that term is defined in Section 1 of the Shipping Act, 1916.[6] The conference members, viz., steamship lines, are voluntarily associated together to maintain uniform freight rates in international commerce under the

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[6] 46 U.S.C. §801.

statutory exemption from the Sherman Act provided in Section 15 of the Shipping Act.[9]

The orders here under review are two of twenty-two identical orders served by the respondent Commission on March 30, 1964, together with an omnibus Report, entitled "The Dual Rate Cases", also served that date. The Report purported to be the "final decision" in twenty-two separate, adjudicatory cases.[10]

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1. BACKGROUND—THE ISBRANDTSEN CASE AND THE CONGRESSIONAL RESPONSE.

The underlying subject matter is the so-called "dual rate" system of tying contracts between conference steamship lines and their customers, shippers of cargo in foreign trade.

In *Isbrandtsen, supra,* this Court held one such "dual rate" system unlawful under Section 14 of the Shipping Act. Congress responded to *Isbrandtsen* on August 12, 1958, less than three months after the decision, with passage of moratorium legislation, P.L. 85-626, 72 Stat. 574, specifically reversing the effect of the *Isbrandtsen* decision.[11] At the same time, three separate committees of Congress commenced studies of the conference system of rate-making in foreign trade and the "dual rate system"

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[9] 46 U.S.C. §814.

[10] There were sixty-one contract forms, called "dual rate contracts", filed with the Commission pursuant to Section 3 for approval under Section 14b of the statute. Through consolidation by consent of the parties, these sixty-one adjudicatory cases were reduced to twenty-two.

[11] See Sen. Report No. 860, 87th Cong., 1st Sess., p. 9 (1961).

of tying contracts in particular. The moratorium was later extended to complete the Congressional studies.[12]

On October 3, 1961, the President signed into law Public Law 87-346. The Act's purpose was stated in its preamble:

> "to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees . . . ."

The new statute amended Section 14 of the Shipping Act —the basis of *Isbrandtsen*—by the addition of a new Section 14b, to require:[13] (1) that all dual rate contracts contain eight specific provisions enumerated in the statute; (2) that existing contracts be amended to include the eight statutory requirements, and be filed with the Commission by March 3, 1962; and (3) that the Commission "by order" permit the use of each contract, so filed, if the Commission determined that it complied with the new statute, by April 3, 1963.[14] A catch-all clause was included in the new Section 14b to authorize the Commission to add other contract terms "not inconsistent" with those prescribed in the statute. (Section 14b(9)). A new Commission was then created[15] and the new statute became effective on October 3, 1961. Petitioners duly

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[12]Public Law 86-542, 74 Stat. 253; Public Law 87-75, 75 Stat. 195.

[13]In conjunction with the transitional Section 3 of P.L. 87-346.

[14]Extended at the request of the Federal Maritime Commission to April 3, 1964.

[15]The latest in the succession of agencies entrusted with the administration of the Shipping Act, the present Commission was established on August 11, 1961, pursuant to Reorganization Plan No. 7 of 1961 (26 F.R. 7315).

amended their contract forms to comply with the new statute and filed them for approval under Section 14b.

2. THE COMMISSION'S INTERPRETATION OF SECTION 14b.

When sixty-one dual rate contract forms, including Petitioners', were filed with the new Commission on or before the statutory due date of March 3, 1962, for the Commission's determination of their compliance with the requirements of Section 14b, the new Commission initially reacted with the creation of a uniform type of contract which was published in the Federal Register as a "proposed general rule".[16] The Commission's proposed uniform contract differed from all existing industry contracts in form, size and substance, and was abandoned, together with the entire rule-making docket, after causing "a storm of protest".[17]

The Commission then served notice of sixty-one separate hearings, to be held on each individual contract under authority of Section 22 of the Shipping Act, 46 U.S.C. §821, each looking toward the administrative determinations called for by Section 14b [R. II-6; IV-382].[18]

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[16]F.M.C. Docket 983, "Rules Governing Contract Rate Systems in the Foreign Commerce of the United States;" Notice of Proposed Rulemaking published in the Federal Register of March 21, 1962; Notice of Proposed Final Rules and Uniform Agreement published January 3, 1963.

[17]See App.B, p. 5. See also 3 S.R.R. at 717.

[18]Pacific Coast European Conference's proceeding was designated Docket 1007; that of the Pacific Coast River Plate Brazil Conference was designated Docket 1057 and, on consent of the parties, was consolidated with Dockets 1003, 1092, et al., involving substantially the same carriers in adjacent South American trades. Others of the sixty-one cases were similarly consolidated into an aggregate of twenty-two proceedings; see note 10, *supra*.

Separate hearings were held in each case, at the conclusion of which each Hearing Examiner issued an Initial Decision in accordance with Section 8 of the Administrative Procedure Act, 5 U.S.C. §1007. Each Examiner sustained the contract before him with minor changes which Petitioners in each case accepted [R. II-179; IV-611].

While the hearings were in progress, the Commission announced the "severance" of five "major issues" said to be common to all hearings [R. X-853]. These Petitioners objected [R. X-861],[19] unsuccessfully [R. X-896]. The issues "severed", for the alleged "convenience" of certain intervenors, were then committed to a "Panel of Five Examiners" for separate disposition in a consolidated proceeding called Docket 1111. Docket 1111 was labelled "Adjudication of Major Issues". An "Initial Decision" was subsequently rendered by the Panel of Examiners [R. X-898].

Section 3 of P.L. 87-346 afforded the Commission two years[20] to act on the contracts filed under Section 14b, i.e., until April 3, 1964. On March 27, 1964, the Commission suddenly, and without notice, announced that it had consolidated all twenty-two pending cases into a single one for final decision, and, simultaneously, released to the public press an omnibus report called "The Dual Rate Cases" which, three days later, the Commission served upon Petitioners, together with the orders here under review. Identical orders, with the accompanying report,

[19]The Commission's Rules of Practice provide that proceedings will be consolidated only upon consent of the parties.

[20]Originally one year, but extended an additional year at the Commission's request.

were similarly served upon all sixty-one conferences throughout the foreign commerce of the United States.

Although ostensibly "approving" each of the sixty-one diverse contracts filed with it, what the Commission actually did was disapprove each contract filed, since the identically-worded orders commanded the use of a newly-devised, theretofore unrevealed "standard uniform contract", "to the exclusion" of all others [R. XII-1210; XII-1217].[21] The Commission's omnibus report ignored the individual hearing records before the Commission except casually to refer to them collectively, plus the consolidated Docket 1111, as "background" for the Commission's formulation of its newly announced "standard, uniform contract".

As correctly stated by the Court below, the Commission's "uniform" contract:

> "was not the contract considered by the examiner[s] in petitioners' proceedings. It contained provisions not specifically required by §14(b) and not discussed in the hearings had upon petitioners' proposed contracts."[App.B, pp. 6-7.]

Commissioner John S. Patterson issued a powerful dissenting opinion, objecting as a matter of law to the majority's arbitrary action in failing to pass upon each contract filed for approval, as required by Section 14b.[22] In his dissent, Commissioner Patterson individually considered the record and Initial Decision of the Presiding Examiners in each of the twenty-two adjudicatory cases, saying

[21]The orders, plus "uniform contracts," for these two Petitioners are included in the Supplemental Appendix.

[22]R. XII-1164; 3 S.R.R. commencing at 715.

that, in each case, the records required approval under the statutory standards of Section 14b, and as initially approved by the respective Examiners, although, in some instances, with certain minor modifications, not material here [see R. XII-1196-1209; 3 S.R.R. at 731-737].

In view of the statutory expiration date,[23] but four days from service of the omnibus report and orders, Petitioners despaired of relief from the Commission and on April 10, 1964, filed in the Ninth Circuit Court of Appeals their respective petitions for review, pursuant to the Review Act of 1950[24] [R. I-2].[25] Petitioners sought interlocutory relief, which was denied.[26]

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3. THE COURT OF APPEALS' AFFIRMANCE.

On February 3, 1964, the Court of Appeals issued a consolidated opinion in the captioned appeals.[27] In all but a minor portion, it sustained the actions of the Commission. In so doing, the Court invoked a theory at once wholly at odds with the theory of the statute and with the theory under which the Commission itself had purported

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[23]Section 15 of the Shipping Act provides a penalty up to $1000-a-day for violation of Section 14b (46 U.S.C. §814).

[24]5 U.S.C. §§1031 et seq. (1958).

[25]The Record as certified to this Court contains only the papers filed on behalf of Petitioner Pacific Coast European Conference; the petition for review filed by Petitioner Pacific Coast River Plate Brazil Conference was substantially identical to that of the European Conference, to which the Record reference pertains.

[26]*Cf. Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920), holding that interlocutory relief should have been granted in the face of similar monstrous, daily penalties. Accord: *Ex Parte Young*, 209 U.S. 123, 147-148 (1908).

[27]Together with the appeal of a third, newly-formed conference which, for reasons not here relevant, chose not to seek certiorari.

to act. The Commission acted throughout the proceedings under Sections 5, 7 and 8 of the Administrative Procedure Act. The Court sustained the Commission's action, however, as the formulation of agency rules under Section 4 of the Administrative Procedure Act, as:

> "a prospective determination of the standards under which the conferences were to be permitted to act in the future rather than an adjudication as to whether those standards in a particular case had been met." [App.B, p. 11].[28]

Notwithstanding the fact that the statute clearly required a contract-by-contract determination, viz., "an adjudication as to whether those standards in a particular case had been met"—and, indeed, admitting that, "In each [case], the issue was whether the contract contained the provisions required by the new [amendment to the] Shipping Act"—the Court nevertheless held that the Commission should not be required to act upon each contract before it as,

> "it would have imposed an unusually heavy burden upon the Commission to require it to treat each contract individually . . . ." [App.B, p. 10].[29]

As authority for this radical departure from the statute's express commands, the Court lifted from the statute a

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[28]In the enactment of Section 14b in P.L. 87-346, Congress determined "the standards under which conferences were to be permitted to act in the future." It committed to the Commission only the duty to determine whether each contract filed met those legislative standards.

[29]This despite the facts that (a) the "heavy burden" had already been virtually discharged by the several Initial Decisions of the various Examiners, and (b) as already noted, the dissenting Commissioner had no trouble in "treat[ing] each contract individually" in his separate opinion.

small clause which it termed the "all-important proviso" of the statute, Section 14b(9). That clause, following eight specific requirements which Congress had laboriously fashioned, provided that dual rate contracts should also:

> "contain such other provisions not inconsistent herewith as the Commission shall require or permit".

In its Report, the Commission itself had *not* purported to act under this clause, except in a few isolated minor instances. The Commission simply took each of the eight detailed requirements of the statute, changed them radically and, as changed, put all together into a compulsory "standard form of contract".

Finally, although conceding that:

> "Petitioners could reasonably assume . . . that they were engaged in a hearing under §7 and §8 of the Administrative Procedures [sic] Act, with the issues limited to such matters as were there presented" [App.B, p. 13],

nevertheless, the Court held that it was proper for the Commission, at some later, undisclosed point, without notice of any kind, to "revert to general rule"[20] and, without more, to issue a binding "rule", in the guise of an "order", against Petitioners as to any and all matters which were, "*in subject matter*, dealt with in petitioners' adjudicatory dockets or in Docket 1111." [App.B, p. 13].[21]

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[20]The term "revert" referred to the Commission's "Proposed Rules" of 1962 (see note 16, *supra*) which the Court itself acknowledged to have been "abandoned".

[21]The proceedings in Docket 1111 produced a massive record of opinion testimony. Almost every conceivable matter was "dealt with" in some degree, but not as to these Petitioners, and no rules were considered at any point in the hearings.

As noted above, the Court of Appeals remanded Petitioners' cases to the Commission but, in so doing, the Court fashioned the Commission's subsequent actions. Thus guided, the Commission promptly, on June 24, 1965, reissued its original orders as "Orders on Remand", with only two insignificant clauses deleted from the "uniform contract" and simultaneously promulgated as "Proposed Rules". Thus, the Commission has demonstrated that it interprets the lower Court's decision to authorize both orders and rules in the same proceedings, for the same effect.

In the meantime, while this litigation has been pending, Petitioners have continued in effect and operation their own dual rate contracts of more than a quarter century's endurance with ten thousand Pacific Coast exporters.

REASONS FOR GRANTING WRIT

First, to these Petitioners, engaged in foreign trade under extremely competitive conditions from ships of all nations and under a policy both national and international that recognizes the doctrine of "freedom of the seas", an effective tying arrangement with exporters is the only available means of preventing destructive, percentage-differential rate-cutting. The new statute enacted after the *Isbrandtsen* decision declared a national policy to permit:

> "fair and effective dual rate contracts."

The form of contract ordered by the Commission is neither fair nor effective. Such contracts, calling for lower rates

from the carriers to contracting shippers, are executed by the former only to secure exclusive patronage and thereby meet non-conference raiding of established trade routes. The Commission's "standard uniform contract" orders Petitioners to reduce all freight rates by 15% for contracting shippers, but authorizes contracting shippers to patronize any other vessel whenever available simply by "transferring the legal right to select the carrier to any person". As the lower Court aptly said, the Commission did not approve any contract at all; it issued a new regulation [App.B, p. 7].

The Chairman of the Commission has recently, on June 30, 1965, admitted in testimony before a Congressional Committee that seven of the conferences involved in "The Dual Rate Cases" have elected to abandon altogether the use of dual rate contracts rather than substitute the mandatory "standard form" devised by the Commission. These Petitioners will be faced with the same Hobson's choice if the writ is not granted.

Secondly, the Court of Appeals erred in its interpretation of Section 14b. There are important decisions of this Court governing both the procedure and substance of administrative actions that will require a reversal of the lower Court if the writ is granted. Section 14b(9) of the Shipping Act, upon which the Court of Appeals rested what it called the Commission's "broad rule-making powers", closely resembles Sections 8c(5) and 8c(7)(D) of the Agricultural Marketing Agreement Act of 1937,[32] which was before this Court in *Brannan v. Stark*, 342 U.S. 451 (1952). Both statutes first set forth a comprehensive

[32] 50 Stat. 246, 7 U.S.C. §§601 et seq.

list of specifically required contract terms prescribed by Congress after careful study and debate. Both authorize additional requirements by administrative action provided they are "not inconsistent" with the statutory standards.

In the *Brannan* case, this Court decided that subsection 8c(7)(D) of the Agricultural Marketing Agreement Act, which the Court recognized as a mere "catch-all clause", did not authorize the Secretary of Agriculture to add provisions to agreements for the marketing of milk in the Boston area that were inconsistent—as the Court had found—with the specific requirements of the statute itself. The Court said, of the catch-all clause:

> "The Secretary claims authority for the provisions in question is given by the last paragraph of this omnibus subsection, a paragraph authorizing the inclusion of auxiliary provisions 'incidental to . . . the terms and conditions specified in subsections (5), (6), and (7).' Yet it is claimed that the contested provisions are of such basic importance that their validity may be crucial to the success of the whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe." 342 U.S. at 462-463.

The above words of this Court should apply equally here, yet the Court of Appeals refused to consider whether the substance of the Commission's orders was inconsistent with the eight specific requirements of Section 14b of P.L. 87-346. We consistently urged the Court to consider this critical question. Instead, the lower Court termed the catch-all clause an "all-important proviso" that subsumed entirely the rest of Section 14b. Under the proviso,

the Court held that the Commission had been delegated a "choice" between:

> "general rule and uniform contract or of proceeding on a contract-by-contract basis in a series of adjudicatory proceedings to determine the sufficiency of the individual contracts under §14(b), with the Act, unimplemented by rule, forming the applicable standard." [App.B, p. 12].

No such "choice" appears anywhere in the statute. The "applicable standard" in the statute is the only standard. No provision for "implementation" of the statutory standard appears in the statute nor was any implementation intended by Congress. See Report of the Senate Commerce Committee on H.R. 6775, which became P.L. 87-346, saying:

> "Your committee believes that if the eight specific requirements set forth in its amendments are met by the proposed contract, it should be entitled to Commission approval unless the Commission finds that the contract would be detrimental to the commerce of the United States, or contrary to the public interest, or unjustly discriminatory or unfair. We believe that any contract which contains the eight safeguards expressly required by the amended bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair." Sen. Report No. 860, 87th Cong., 1st Sess., p. 23 (1961).

Although Section 14b requires "notice and hearing" in each case, *on all* questions under that section, the lower Court held that the "catch-all clause" of Section 14b(9) authorized the Commission to:

"look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise." [App.B, p. 12].

On the contrary, this Court has held:

"[*E*]*xpertise* is not sufficient by itself. Findings supported by substantial evidence are required." *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81, 93 (1961).

In answer to Petitioners' argument that the Commission's orders commanding them to use the Commission's contract "to the exclusion of all others", though made without statutory findings against Petitioners' own contracts, amounted to the abrogation of Petitioners' contracts without due process of law, the lower Court answered only that,

". . . although in contract form, what the Congress and the Commission have imposed upon the conferences is simply regulation. The Conferences have no right, constitutional or otherwise, to exemption from such regulation." [App.B, p. 7].

The Court refused, despite our petition and insistent argument, to consider the reasonableness of the "regulations".[33]

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[33]Congress, at least, preserved to Petitioners their existing contracts if the eight statutory provisions were included within 6 months from the enactment of P.L. 87-346—as this Court below itself recognized; see App.B, pp. 4-5. It was the Commission that, taking advantage of Petitioners' economic need for the contracts and the Commission's approval, determined to manipulate the contracts so as to impose new regulations upon Petitioners, different from, as well as in addition to, the statute. Petitioners do not object to regulation, but do question the authority of the Commission to impose unreasonable regulations in the guise of "approving" Petitioners' contracts.

If, as the Court of Appeals held, the "catch-all clause" of Section 14b(9) makes the Commission's "regulation" conclusive as to the sufficiency of the ordered contract provisions, then Section 14b(9) should be held unconstitutional. *Ex Parte Young,* 209 U.S. 123, 147 (1908); *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38 (1936); *Oklahoma Operating Co. v. Love,* 252 U.S. 331 (1920).

The reasoning of the lower Court will establish a novel doctrine of administrative law, if not reversed by this Court. The keystone of the lower Court's decision was stated:

> "As to the Commission's method of consolidating hearings upon issues and filing a consolidated report, we note that there were approximately sixty different conference contracts submitted for approval. In each, the issue was whether the contract contained the provisions required by the new Shipping Act. Under these circumstances it would have imposed an unusually heavy burden upon the Commission to require it to treat each contract individually despite the existence of common questions." [App.B, pp. 9-10].

Solely for the Commission's convenience, the Court created the right of an administrative agency to flip-flop back and forth between adjudication and rule-making, in one and the same proceeding, without notice at any time to Petitioners. Such procedure confounds the objectives of the Administrative Procedure Act which is "based upon a dichotomy between rule-making and adjudication".[34]

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[34] *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 14; see also p. 15.

"Countless decisions of this Court, as well, are flatly opposed to this result, holding that where Congress uses the words "after notice and hearing", as in Section 14b, it intends, and commands, adjudication and a decision based solely on the record. See, e.g., *Chicago Junction Case*, 264 U.S. 258, 265 (1924); *Morgan v. United States*, 298 U.S. 468, 480 (1936).

Moreover, this Court has been equally emphatic in condemning the very sort of empty justification, born of expediency, which the Court here created for the respondent Commission—viz., that to have "require[d] it to treat each contract individually" "would have imposed an unusually heavy burden upon the Commission". Clearly, the size of the burden upon the Commission is a legislative matter. The statute calls for Commission action on each contract. Viewing the right of private parties to a decision limited to the hearing record as "one of the 'rudiments of fair play'," this Court has stated:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored". *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 305 (1937).

Further, it was not until the parties were in the Court of Appeals that the Commission's appellate counsel, for the first time, sought to justify the Commission's orders on the theory that they were—at least in part—really "general rules".[35] The Court granted that:

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[35]Compare *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962), and *National Labor Relations Board v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 13 L. Ed. 2d 951, 955 (1965), condemning such reviewing-court acceptance of "appellate counsel's post hoc rationalization for agency action".

> "Petitioners could reasonably assume from this action [viz., service of notice and hearing] that they were engaged in a hearing under §7 and §8 of the Administrative Procedures [sic] Act, with the issues limited to such matters as were there presented." [App.B, p. 13].

Nevertheless, the Court then went on to say that the Commission could, despite Petitioners' "reasonable assumption", "revert to general rule", provided it gave to Petitioners "notice of its intention and an opportunity to participate in the making of rules". So far, so good, but thereupon the Court held:

> "such participation, however, to be limited to such clauses of the proposed contract as were not, in subject matter, dealt with in petitioners' adjudicatory dockets or in Docket 1111." [App.B, p. 13].

But, as the Court acknowledged earlier in its decision:

> "The form of contract attached to the order was initiated by the Commission pursuant to the findings and conclusions of *The Dual Rate Cases* and was not the contract considered by the examiner in petitioners' proceedings. It contained provisions not specifically required by §14(b) and not discussed in the hearings had upon petitioners' proposed contracts." [App.B, p. 7].

In *Morgan v. United States*, 304 U.S. 1 (1938), this Court twice declared the law contrary to the Court of Appeals' holding here, saying:

> "Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be

heard upon its proposals before it issues its final command." 304 U.S. at 18-19, 25.

Petitioners were never advised of the Commission's proposals, or any of them, until served with the final orders.

In summation, the Court's opinion, recognizing that the Commission's orders could not be sustained as the adjudication which the statute required, invented a new theory of "approval by off-the-record rule-making". To do so, however, it necessarily created radical, and unsustainable, "new principles" of administrative law, completely at odds with decisions of this Court and with the Congressional enactments. Review should be taken in this Court's exercise of its supervisory authority over the federal system, in order to correct these outlandish, conflicting "principles," and to reestablish the field of administrative law in a meaningful perspective.

Finally, this Court should take review to resolve an inter-Circuit conflict between the Ninth Circuit and that of the District of Columbia, represented by this case and by the latter Court's recent decision in *Aktiebolaget Svenska Amerika Linien, (Swedish-America Line) v. Federal Maritime Commission,* No. 18,554, decided June 10, 1965, not yet officially reported.

The *Svenska* case concerned Section 15 of the Shipping Act; this case concerns Section 14b. But Section 14b was carefully patterned after the earlier enacted Section 15, and the two cases involved interpretation of the same statutory language.[36] As a comparison readily shows, both

[36]The penalties for violating both Sections 14b and 15 are set forth only in Section 15. See Appendix A, for a reproduction of both sections.

sections require the entry of an "order", after "notice and hearing"; moreover, both provide for mandatory agency approval of each agreement "*unless*" there are affirmative "findings" that an agreement, as submitted, contravenes certain enumerated general "public interest" standards: that is, that it not be "found" to be "detrimental to the commerce of the United States, or contrary to the public interest, or unjustly discriminatory or unfair as between" certain specified groups.[37] The Presiding Examiners here expressly found that Petitioners' contracts were *not* violative of any statutory requirement and the Commission did not disturb these findings.

In *Svenska*, the Maritime Commission had, in precisely the same fashion, arbitrarily overruled the Examiner's Initial Decision approving certain carrier agreements. The Commission ordered "modifications" (or, "other provisions")[38] without supporting findings.[39] The District of Columbia Court was swift and unequivocal in its reversal. Finding neither of the Commission's two "modifications" supported by findings on the record, the Court held:

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[37]Section 15 adds a fourth standard: "or to be in violation of this Act;" presumably this is implicit in Section 14b, as well.

[38]Section 14b has the same meaning. See Commissioner Patterson's dissenting opinion in the instant "Dual Rate Cases":

> "If the contract fails [to satisfy the express statutory tests], the Commission's order may require other provisions as authorized in (9) of Section 14b or the Commission may modify by its order in accordance with Section 3 of P.L. 87-346. Before modifying or requiring something else, however, the Commission must show how the applicant's contract has failed to meet the measure." [3 S.R.R. at 716].

[39]For the same reasons as here, Commissioner Patterson (joined by Commissioner Day) dissented in *Svenska*.

"The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four[40] ways set out in the section by Congress.

• • •

"In the absence of such a specific finding, the [agreement] is, by direction of Section 814 [§ 15], to be approved".

The two cases, interpreting precisely the same statutory scheme as set forth in two adjacent statutory provisions, cannot be reconciled. There is nothing in law or logic which permits disparate treatment of the two comparable sections.[41] This Court should grant review to resolve the conflict.

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[40]See note 37, *supra*.

[41]Indeed, even the Ninth Circuit has heretofore held that the language of Section 15 required an adjudicatory proceeding; see *Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Commission*, 310 F.2d 606 (9th Cir. 1962). The only reason it recited in the instant case, to distinguish that earlier holding, was that "there all parties agreed that the proceeding was adjudicatory"(!); see App.B, p. 11, n. 10. All parties here also agreed that the proceedings were adjudicatory—at least until the appellate proceedings. See text at note 35, *supra*.

CONCLUSION

The statutory policy of Public Law 87-346, "to authorize" "effective and fair dual rate contracts", has been completely frustrated by the Commission's failure and refusal to permit the use of contracts amended by the parties to comply with Section 14b of the Act. Both that policy and the entire administrative process have been further confounded by the lower Court's irrational affirmance. Accordingly, and for the reasons herein stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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LEONARD G. JAMES
ROBERT L. HARMON
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Attorneys for Petitioners.

Dated: September 20, 1965.

(Appendices A, B and C Follow)

Appendix A

STATUTES INVOLVED

Shipping Act, 1916, as amended, 46 U.S.C. §801 et seq.:

Section 14b, 46 U.S.C. §813a:

Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the

contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary

rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is

granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.

Section 15, 46 U.S.C. §814:

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement,

or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall aprove all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide reve-

nue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 22, 46 U.S.C. §821:

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

Public Law 87-346, 75 Stat. 726 et seq.:

Section 3, 75 Stat. 764:

Notwithstanding the provisions of sections 14, 14b, and 15, Shipping Act, 1916, as amended by this Act, all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, canceled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* That all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act, such agreements so amended shall be lawful for a further period of not to exceed one year after such filing. Within such year the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.

Administrative Procedure Act, 5 U.S.C. §§1001 et seq.:

Section 2, 5 U.S.C. §1001:

DEFINITIONS: As used in this Act—

(a) *Agency.*—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to

repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: . . .

(b) *Person and party.*—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) *Rule and rule making.* "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or account-

ing, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) *Order and adjudication.*—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) *License and licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) *Sanction and relief.*—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirements, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recog-

nition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) *Agency proceeding and action.*—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Section 4, 5 U.S.C. §1003:

RULE MAKING: Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice.* General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which

the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) *Effective dates.*—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5, 5 U.S.C. §1004:

ADJUDICATION: In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

(a) *Notice.*—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) *Procedure.* The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement,

or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) *Separation of functions.*—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) *Declaratory orders.*—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Section 7, 5 U.S.C. §1006:

HEARINGS: In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) *Presiding officers.*—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) *Hearing powers.*—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause deposi-

tions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record.*—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record

for decision in accordance with section 8, and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8, 5 U.S.C. §1007:

DECISIONS: In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall intially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except

that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) *Submittals and decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusion. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Appendix B

OPINION AND JUDGMENT OF THE COURT BELOW

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC COAST EUROPEAN CONFERENCE AND MEMBERS THEREOF, *Petitioners*, vs. UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION, *Respondents*.	Nos. 19,237, 19,238, 19,239
LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE, *Petitioners*, vs. FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	
PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE AND ITS MEMBER LINES, *Petitioners*, vs. UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION, *Respondents*.	

[February 3, 1965]

On Petition for Review of Order of the Federal Maritime Commission

Before: HAMLEY, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge:

The orders here under review[1] are two[2] of twenty-two substan-

[1]Pursuant to the Review Act of 1950, as amended in 1958, 5 U.S.C. §§1031-1042 (1958).

[2]One of the orders relates to two petitioners: Latin America/Pacific Coast Conference and Pacific Coast River Plate Brazil Conference (FMC Docket Nos. 1092 and 1057, respectively).

tially similar orders issued by the Federal Maritime Commission pursuant to its report entitled *The Dual Rate Cases.*

The orders are here attacked as in excess of the Commission's authority as bestowed by §14(b) of the Shipping Act of 1916, as amended, 46 U.S.C. §813a (Supp. V, 1964)[3] (later discussed),

[3]"Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter 'Commission'), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which

and contrary to the intent of that section; and, through lack of notice and hearing, as in violation of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§1001-1011 (1958).

Petitioners are three of some sixty steamship conferences affected by *The Dual Rate Cases* and orders entered pursuant to that report. These conferences are rate-fixing associations of carriers, all of whom are engaged in the water-borne commerce of the United States and whose association is permitted by §15 of the Shipping Act of 1916, as amended, 46 U.S.C. §814 (Supp. V, 1964), subject to approval of their agreements of association by the Federal Maritime Commission.

These proceedings involve those provisions of the several agreements of association which permit the fixing of "dual rates": the granting by a conference of preferential rates to shippers who have agreed with the conference to patronize it exclusively.

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spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term 'contract shipper' means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section."

Prior to the enactment of the legislation with which we are here concerned the lawfulness of dual rate contracts had long been questioned as contrary to established antitrust policy. In 1958 the Supreme Court, in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), had held such a contract to be in violation of §14 Third of the Shipping Act of 1916, 39 Stat. 733 (1917), and had thus cast doubt on the validity of such arrangements. Congress sought to clarify and remedy the situation. After three years of study Public Law 87-346, 75 Stat. 762 (1961), was enacted October 3, 1961. Its declared purpose was "• • • to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees • • •." By §3, interim validity of existing dual rate agreements was provided.

The meat of the Act was in what has become §14(b) of the Shipping Act of 1916, as amended, 75 Stat. 762 (1961), 46 U.S.C. §813a (Supp. V, 1964), which provides that the Federal Maritime Commission shall permit dual rate agreements,

> "• • • unless the Commission finds that the contract • • • will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors."

The authority of the Commission to permit such contracts was limited by requiring that the contracts in eight specified respects meet the congressional judgment as to what they should include. Listed as specification Nine was the requirement that a contract shall contain "• • • such other provisions not inconsistent herewith as the Commission shall require or permit." Thus was imposed upon the Commission the task of reviewing and revising all agreements under which the conferences were operating with respect to dual rates.

The provisions for interim validity of existing dual rates contracts set forth a schedule for bringing those contracts into line with §14(b)'s requirements. The conferences, within six months, were to file with the Commission their proposals as to how their existing contracts should be amended to meet the new requirements. Thereafter the existing contracts as so amended should be

valid for a further period of one year, during which period "the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act." By subsequent enactment the time allowed the Commission (and the period of interim validity) was extended to April 3, 1964, 77 Stat. 5 (1963).

These petitioners duly submitted their proposed amendments to the Commission before expiration of the six-month period specified.

On March 21, 1962, the Commission gave notice by publication in the Federal Register, 27 Fed. Reg. 2647 (1962), that pursuant to the provisions of the Shipping Act it was considering the promulgation of certain rules and regulations governing the use of contract rate systems as authorized by §14(b).

On January 3, 1963, the Commission published in the Federal Register its "Notice of Proposed Final Rules and Uniform Agreement." Reciting its earlier notice the Commission stated:

> "Having given due consideration to the comments of interested persons filed in response to said notice the Federal Maritime Commission hereby gives notice that it is considering the promulgation of final rules in this matter. These proposed final rules are as follows:" 28 Fed. Reg. 74 (1963).

There followed a proposed uniform contract for all conferences.

A storm of protest arose from the conferences over this proposed resort to a uniform contract. The conferences contended that the Commission's function under §14(b) was to conduct individual hearings on the amendments as proposed by the individual conferences to determine whether those amendments conformed to the requirements of that section.

The Commission acceded to conference demands. On April 9, 1963, it entered its "Order of Investigation and Hearing" respecting Pacific Coast European Conference (typical of the orders respecting the individual conferences) for hearing before an examiner upon the amended contract as proposed by that conference.[4]

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[4]The order provides in part:

"The Commission has before it the approval, disapproval, modification or cancellation of the above amended exclusive patronage (dual rate) contract.

THEREFORE, IT IS ORDERED, That pursuant to sections 14(b) and 22 of the Shipping Act, 1916, an investigation and hearing is hereby

Subsequently, on the petition of various shippers and shipper associations, certain so-called "major issues" were severed from most of the proceedings on the individual contracts and were heard before a panel of five examiners in a proceeding assigned Commission Docket No. 1111. The Commission's order of investigation and hearing in this docket stated that the proceeding was instituted in order to lessen the burden of shippers (who might be signatories to dual rate contracts with a number of conferences, and who might otherwise have to participate in substantially every proceeding before the Commission), and for the purpose of achieving "optimum uniformity" in contract provisions.

On December 3, 1963, petitioners' examiner rendered his initial decision. Subject to certain specified modifications, and subject to the rulings in Docket 1111, he concluded that the proposed contract met the requirements of §14(b) and was not detrimental to the commerce of the United States, contrary to the public interest or unjustly discriminatory or unfair and should be permitted in use in foreign commerce by the conference.

On March 27, 1964, the Commission handed down its report entitled *The Dual Rate Cases*, together with orders in petitioners' proceedings to the effect "that the agreement submitted to the Commission by the respondents in the above proceedings are hereby approved in the form attached to this order" and providing that the attached form of order should become effective April 4, 1964, "to the exclusion of any other terms and provisions." The report and order were served on petitioners on March 30, 1964.

The form of contract attached to the order was initiated by the Commission pursuant to the findings and conclusions of *The Dual Rate Cases* and was not the contract considered by the examiner in petitioners' proceedings. It contained provisions not

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instituted to determine whether the form of said exclusive patronage (dual rate) contract meets the requirements of section 14(b), will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and whether the use of said form of exclusive patronage (dual rate) contract should be permitted or said contract should be ordered modified in any respect whatsoever pursuant to section 14(b)."

specifically required by §14(b) and not discussed in the hearings had upon petitioners' proposed contracts.

Petitioners assert that they were thus required, on four days' notice, to commit themselves by agreement to grant concessions to contract shippers above and beyond those called for by the Shipping Act, as to which there has been no hearing in their proceedings, and which in fact were, as to them, unnecessary and prejudicial to the point of unfairness.

Petitioners did not seek rehearing before the Commission pursuant to its Rule 16, 18 Fed. Reg. 3726 (1953), 46 C.F.R. §201.261,[5] upon these protested contractual provisions. Instead they promptly brought this proceeding for judicial review, not primarily attacking the substance of the contracts approved by the Commission but rather the procedures by which they were formulated.

1. Petitioners contend that their rights under their outstanding contracts constituted property rights protected by the Fifth Amendment; that Congress through enactment of §14(b) and the Commission by imposing a mandatory agreement upon the conference without their consent have deprived them of their right freely to contract about their business affairs. Specifically, petitioners contend that their contracts constitute property which the Commission is "taking" without due process.

It is obvious, however, that although in contract form, what the Congress and the Commission have imposed upon the conferences is simply regulation. The conferences have no right, constitutional or otherwise, to exemption from such regulation. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). They have no right, constitutional or otherwise, to persist in a course which Congress has now found to be discriminatory to shippers and violative of the antitrust policies.[6]

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[5]This Rule provides, in part, as follows:
"Upon petition or its own motion, the Board [now Commission] may at any time after reasonable notice, reopen any proceeding under these rules for rehearing, reargument, or reconsideration and, after opportunity for hearing, may alter, modify, or set aside in whole or in part its report of findings or order therein if it finds such action is required by changed conditions in fact or law or by the public interest."

[6]It should be noted that petitioners are required to use the contracts here at issue only if they wish some of their practices to be exempted

2. Petitioners contend that the Commission has not proceeded in accordance with §14(b). They point to the statutory provision that the Commission *shall permit* the use by a conference of *any contract* providing dual rates *unless* the Commission finds the contract to be detrimental to commerce or contrary to public interest or unjustly discriminatory or unfair. They assert that the Commission has not so found as to their proposed contract, and that the hearing examiner expressly found to the contrary. They contend that the congressional intent, disregarded by the Commission, was to authorize conferences to continue under their *existing* contracts without interruption, provided only that they be amended to the extent required.

But petitioners overlook §14(b)'s all-important proviso—"provided that the contract * * * expressly * * * (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit."

There was thus plain authority in and direction to the Commission to give consideration to and to require agreement on other matters than those occurring to Congress.[7] Such matters would normally be initiated by the Commission and its reference to an examiner of petitioners' proposals can hardly be construed as a delegation or a surrender of that function.

As a deference owed to existing contracts, the Commission had made it plain from the outset that it regarded uniformity of contract, a counterbalancing consideration, as desirable in the public interest. Legislative history demonstrates that such was the

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from the provisions of the antitrust laws. If they do not wish to be so exempted, they need not, of course, accept the contract promulgated by the Commission.

[7]For example, the Senate Commerce Committee Report on the bill stated:

"This broad rulemaking mandate [of §9] should move the Commission, for example, to deal with three matters which the National Industrial Traffic League has urged upon us and upon the House Committee. While we would be strongly opposed to trying to freeze into legislation the solution to any of these three problems, they present matters which it seems to us the Commission is equipped to an [sic] should deal with under its rulemaking function." *Index to Legislative History of the Steamship Conference/Dual Rate Law*, S.Doc.No. 100, 87th Cong., 1st Sess. 213 (1962).

view of Congress as well.[8] While strict uniformity did not result due to difference of circumstances affecting the different conferences, it was cetrtainly within the authority of the Commission, and, as we view it, wholly consistent with the spirit of the Shipping Act of October 3, 1961, to seek uniformity to the extent possible.

As to the Commission's method of consolidating hearings upon issues and of filing a consolidated report, we note that there were approximately sixty different conference contracts submitted for

[8]As is discussed in the Commission's report, the Committee on the Merchant Marine and Fisheries of the House of Representatives, in its report on the bill which ultimately became Public Law 87-346, made it clear that the statute should result in more or less uniform dual rate contracts. The Committee said:

"It is the expectation of the committee that a standard form of contract to be utilized by all conferences will be approvad by the Board [now Commission] with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problem of shippers, who, of necessity must be members of a number of conferences, with respect to interpretation and application of differing provisions." Senate Committee on Commerce, *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, S.Doc.No. 100, 87th Cong., 1st Sess. 120 (1962).

This objective was further emphasized by the Antitrust Subcommittee of the Committee on the Judiciary which played a major role (see *Index to the Legislative History of the Steamship Conference/Dual Rate Law, supra*, 117) in the formulation of Public Law 87-346 when it subsequently said:

"The Federal Maritime Commission should establish minimal standards for dual-rate contracts beyond those set forth in Public Law 87-346 and should devise and publish a basic form contract to be used by all conferences." H.Rept. No. 1419, 87th Cong., 2d Sess., page 390 (1962).

Petitioners argue that the House Reports should be paid little heed because the House-passed bill was amended in certain regards in the Senate. These amendments, however, had no bearing upon the need for uniform contracts. If anything, they strengthened the statutory position of the Commission from what it had been under the House-drafted bill. Thus the report of the House managers of the bill, after the Senate-House conference, stated that:

"The House authorized the Commission to make rules and regulations necessary under specified sections of the act: the Senate amended by broadening the authority to include the entire act. The House receded from its position." *Index to the Legislative History of the Steamship Conference/Dual Rate Law, supra*, 445.

approval. In each, the issue was whether the contract contained the provisions required by the new Shipping Act. Under these circumstances it would have imposed an unusually heavy burden upon the Commission to require it to treat each contract individually despite the existence of common questions.

We conclude that the Commission's procedures were not contrary to §14(b).

3. Petitioners attack the procedure followed by the Commission as violative of the Administrative Procedures Act in certain respects. They make the following contentions:

(a) Neither the order nor the report *The Dual Rate Cases* contain findings, conclusions or reasons or basis for the Commission's decision, contrary to the requirements of §8(b) of the Administrative Procedures Act, 5 U.S.C. §1007(b) (1958).

(b) Under §7(d) of the Administrative Procedures Act, 5 U.S.C. §1006(d) (1958), the transcript of testimony and exhibits in petitioners' proceedings should have constituted the exclusive record for decision of the Commission. By including in its approved contract clauses other than those under consideration in petitioners' proceedings, the Commission has gone beyond this record.

These sections of the Administrative Procedures Act relate primarily to adjudicatory proceedings rather than rule making proceedings. It is clear that in promulgating *The Dual Rate Cases* the Commission was proceeding in the area of rule making.

"Rule" and "rule making" are defined as follows in §4(c) of the Administrative Procedures Act, 5 U.S.C. §1001(c) (1958):

> "'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

Petitioners contend that §14(b) did not permit the Commission to proceed by general rule; that it was required by the Shipping Act to proceed on a contract-by-contract basis. For the reasons already discussed we cannot agree.[9]

In our judgment the terms and conditions under which dual rates might be charged were the subject of rule making. In this area the Commission was acting in implementation of §14(b); its action was legislative rather than judicial in character. It was a prospective determination of the standards under which the conferences were to be permitted to act in the future rather than an adjudication as to whether those standards in a particular case had been met.[10] The rule making requirements with respect to hearings are set forth in §4(b) of the Administrative Procedures Act, 5 U.S.C. §1003(b) (1958), which provides:

> "After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose."

It is apparent that in rule making hearings the purpose is to permit the agency to educate itself and not to allow interested parties to choose the issues or narrow the scope of the proceedings. The purpose of the notice is to allow interested parties to make useful comment and not to allow them to assert their "rights" to insist that the rule take a particular form. The agency,

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[9]Both the Senate and House committee reports on the bill extending the time allowed the Commission (77 Stat. 5 [1963]) treated the action here under review as rule making: "The volume and diversity of comments from carriers and shippers *in the necessary rule making procedures* were enormous * * *." S.Rept. No. 79, 88th Cong., 1st Sess. 2 (1963) (emphasis added); "In view of the necessity of examining these contracts * * * and the *necessity of instituting a rule making procedure* to achieve uniformity in its results * * *." H.R.Rept. 164, 88th Cong., 1st Sess. 2 (1963) (emphasis added).

[10]*Anglo-Canadian Shipping Co. v. FMC*, 310 F.2d 606 (9 Cir. 1962), cited by petitioners is not in point as there all parties agreed that the proceeding was adjudicatory, 310 F.2d 606, 615, n.2.

in rule making, can look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise.

That §7 and §8 of the Administrative Procedures Act are not to apply to the rule making hearings required by §14(b) of the Shipping Act is also clear from §4(b) of the Administrative Procedures Act:

> "Where rules are required by statute *to be made on the record after opportunity for any agency hearing*, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection." [Emphasis supplied.]

While §14(b) does require "notice and hearing," still, it does not require that the rules for which it provides to be made "on the record" after opportunity for agency hearing. The provisions of §7 and §8 of the Administrative Procedures Act, therefore, do not apply to the rule making provisions of §14(b) of the Shipping Act.

Petitioners contend that the Commission, by ordering hearings on the individual contracts proposed by the conferences, abandoned its rule making approach and resorted instead to a series of adjudicatory proceedings upon the individual contracts under consideration; that the requirements of §7 and §8 of the Administrative Procedures Act should apply to those proceedings. They assert that when, on March 27, 1964, *The Dual Rate Cases* was handed down, the Commission thus, without notice, reverted to rule making, disregarding and abandoning in mid-stream their adjudicatory proceedings and the rights of the conferences which were then in issue.

In this we agree in part with petitioners.

As we view the situation, the Commission was faced with the choice of going ahead as originally planned by general rule and uniform contract or of proceeding on a contract-by-contract basis in a series of adjudicatory proceedings to determine the sufficiency of the individual contracts under §14(b), with the Act, unimplemented by rule, forming the applicable standard.

Although the proposed uniform contract, as published in January, 1963, was never formally withdrawn, still, by acceding to

conference demands, and by entering its orders of April 9, 1963, for hearing before an examiner of petitioners proposed contracts, the Commission indicated that it had chosen to proceed not by general rule but by individual adjudicatory proceedings on the individual contracts. Petitioners could reasonably assume from this action that they were engaged in a hearing under §7 and §8 of the Administrative Procedures Act, with the issues limited to such matters as were there presented.

We do not agree with petitioners that the Commission thereafter was without power to revert to general rule and that its only alternative was to proceed under §7 and §8.

In our judgment, however, under the requirements of the Administrative Procedures Act, it could not revert to general rule without first giving a §4(b) notice of its intention and opportunity to petitioners to participate in the making of rules in the manner set forth in §4(b). This it has not done. The remedy, however, is not through judicial action to restore to the conferences their own form of contract, but rather to restore to the conferences their opportunity to participate.

We conclude that the order of the Commission must be set aside and that in any new order opportunity must be afforded petitioners to participate in rule making in such manner as the Commission may direct pursuant to §4(b); such participation, however, to be limited to such clauses of the proposed contract as were not, in subject matter, dealt with in the hearings in petitioners' adjudicatory dockets or in Docket 1111.

This is not intended to suggest that notice was deficient only in its scope and that it must have encompassed the whole of the rule which ultimately emerged. We recognized that such is not the law. The deficiency here was in failure to give any notice whatsoever. It is the prejudice resulting from this failure which is limited, and which impels us to limit the scope of the participation to which petitioners are entitled upon remand. Petitioners have already, through the hearings which have been had, enjoyed to the fullest participation in the making of the resulting rule in the areas covered by those hearings.

We gather that this area in which petitioners have already participated covers the greater portion of the contract as ap-

proved by the Commission. As to that portion, the Commission is, of course, free forthwith to promulgate rules and establish the substance of approved contracts as to petitioners.

As to the contract of one of the petitioners, Latin America/ Pacific Coast Steamship Conference (Docket No. 1092), a hearing was ordered by the Commission but the conference was not named as party to Docket 1111. What we have said, however, applies to this petitioner as well as to the rest. Since the Commission was proceeding in the area where rule making was not required to be made "on the record," the notice and hearing requirements of §4(b) of the Administrative Procedures Act were met if the conference had notice, and an opportunity to present its views to the Commission in hearing of Docket 1111. This it clearly had.[11] If it had anything to submit it could have joined in any appropriate proceeding.

Accordingly the orders under review are hereby set aside.

[11]For example, the conference in Docket 1092 was represented by the same counsel who represented the conference in Docket 1057, which was made a party to Docket 1111.

In the United States Court of Appeals
for the Ninth Circuit

Pacific Coast European Conference and Members Thereof, Petitioners, vs. United States of America, and Federal Maritime Commission, Respondents.	No. 19,237

DECREE

On petition to review Orders of the Federal Maritime Commission

This cause came on to be heard on the petition to review Orders of the Federal Maritime Commission, and on the transcript of record, briefs filed and arguments had by counsel for respective parties, and was duly submitted: On consideration whereof, It Is Now Here Ordered and Adjudged by this Court that the orders of said Federal Maritime Commission under review be, and hereby are set aside.

Filed and entered February 3, 1965.

In the United States Court of Appeals
for the Ninth Circuit

Pacific Coast River Plate Brazil Conference and its Member Lines, Petitioners, vs. United States of America and Federal Maritime Commission, Respondents.	No. 19,239

DECREE

On petition to review Orders of the Federal Maritime Commission.

This cause came on to be heard on the petition to review Orders of the Federal Maritime Commission, and on the transcript of record, briefs filed and arguments had by counsel for respective parties, and was duly submitted:

On consideration whereof, It Is Now Here Ordered and Adjudged by this Court that the orders of said Federal Maritime Commission under review be, and hereby are set aside.

Filed and entered February 3, 1965.

Appendix C

Supreme Court of the United States

October Term, 1965

No.

Pacific Coast European Conference, et al.,
Petitioners,

vs.

United States, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 27, 1965.

William O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 17th day of July, 1965.